SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1274

WATKINS MOTOR LINES, INCORPORATED, a Florida corporation; THE INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; and WACO FIRE AND CASUALTY INSURANCE COMPANY, a Georgia corporation, *Petitioner*,

v.

ZERO REFRIGERATED LINES, a Texas corporation; and CONTINENTAL NATIONAL ASSURITY GROUP, an Illinois corporation, *Respondent*,

and

CONTINENTAL CASUALTY COMPANY and BANKERS AND SHIPPERS COMPANY OF NEW YORK, *Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## INDEX


| | Page |
|---|---|
| Opinions below | 2 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutory provisions involved | 3 |
| Statement of the case | 5 |
| Reasons for granting the writ | 7 |
| 1. The Decision Below Conflicts With the Proper Interpretation of 49 U.S.C. § 304(E) | 7 |
| 2. The Decision by the District Court Was Premature Since the Negligence of the Equipment Operator Had Not Been Determined | 11 |
| Conclusion | 12 |
| Appendix (Opinion and Judgment of Court of Appeals and District Court and Indemnity Agreement) | 1a |


## CITATIONS

CASES:


| | |
|---|---|
| American Trucking Assns. v. United States, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953) | 10 |
| Diamond Transportation System, Inc., Ext.-Wis. and Okla. Origin, 117 M.C.C. 706 | 8 |
| Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 96 S.Ct. 229 (1975) | 7, 8, 9, 10 |
| Watkins v. Zero, 525 F.2d 538 | 9a |
| Watkins v. Zero, 381 F.Supp. 363 (N.D. Ill. 1974) | 6, 1a |


OTHERS:


| | |
|---|---|
| 28 U.S.C. § 1254(1) | 2 |
| 49 U.S.C. § 304(E) | 3, 7 |
| 49 C.F.R. § 1057.4 | 8 |
| 49 C.F.R. § 1057.5 | 3, 11 |
| Rule 59, Federal Rules of Civil Procedure | 11 |

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v.

ZERO REFRIGERATED LINES, a Texas corporation; and CONTINENTAL NATIONAL ASSURITY GROUP, an Illinois corporation, *Respondent,*

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CONTINENTAL CASUALTY COMPANY and BANKERS AND SHIPPERS COMPANY OF NEW YORK, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioners WATKINS MOTOR LINES, INC., THE INSURANCE COMPANY OF NORTH AMERICA and WACO FIRE AND CASUALTY INSURANCE COMPANY respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 11, 1975.

## OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit, was reported in 525 F.2d 538, and the opinion of the District Court for the Northern District of Illinois was reported in 381 F.Supp. 363 (N.D. Ill. 1974). (Copies of both opinions are attached in the Appendix hereto.)

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 11, 1975. A timely Petition for Rehearing was denied on January 29, 1976, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether 49 U.S.C. § 304 (e), in conjunction with 49 C.F.R. § 1057.5 which deals with interchanges of equipment between I.C.C. authorized carriers, prohibits an indemnification agreement that completely releases the lessee from liability to the public?

2. Whether I.C.C. authorized carriers and/or their insurance carriers, parties to an interline agreement and a hold harmless clause, are entitled to indemnification from each other for the settlement of a negligence action from an accident involving interlined equipment?

3. Whether Summary Judgment under Rule 56, Federal Rules of Civil Procedure, may be granted against an equipment-lessor who has agreed to indemnify the lessee for damages paid by it to a third party

for injuries arising out of negligence of the equipment operator without first having a factual determination that the driver of the vehicle was negligent.

## STATUTORY PROVISIONS INCLUDED

49 U.S.C. § 304(e):

(e) (T)he Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

49 C.F.R. § 1057.5

Authorized common carriers may by contract, lease, or other arrangement interchange any equipment defined in § 1057.2 with one or more other such common carriers, or one of such carriers may receive from another such carrier, any of such equipment, in connection with any through movement of traffic, under the following conditions:

(e) Identification of equipment as that of the operating carrier. Authorized carriers operating power units in interchange service shall identify

such equipment in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Motor Carrier Vehicles). Any removable device used to identify the operating carrier shall be on durable materials such as wood, plastic, or metal, and shall bear a serial number in the operating carrier's own series and such carrier shall keep a proper record of each identification device in use. The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment. Authorized carriers operating equipment in interchange service under this section shall carry with each vehicle so operated, except trailers and semitrailers, a copy of the contract, or other arrangement, while the equipment is being operated in the interchange service, unless a statement certifying that the equipment is being operated by it and identifying the equipment by company or State registration number, showing the specific point of interchange, the date and time of the assumption of responsibility for the equipment, and the use to be made of the equipment, is carried in the vehicle while it is operated in interchange service.

Such statement shall be signed by the parties to the contract or other arrangement or their employees or agent.

(f) Connecting carriers considered as owner. An authorized carrier receiving equipment in connection with a through movement shall be considered the owner of the equipment for the purpose of leasing the equipment to other authorized carriers in furtherance of the movement to destination or the return of the equipment after the movement is completed.

## STATEMENT OF THE CASE

In January, 1968, Watkins Motor Lines (hereinafter called Watkins) and Zero Refrigerated Lines (hereinafter called Zero) entered into an interline agreement for the interchange of one company's equipment along the other company's route. From that date until April, 1974, there were approximately 750 exchanges of equipment between Watkins and Zero under this agreement. An indemnification contract was signed concurrently with the interline agreement. This indemnification agreement required Watkins to hold Zero harmless for any liability in connection with operation of Watkins equipment interlined over the routes on which various motor carrier regulatory bodies had authorized Zero to operate. A copy of the indemnity agreement is included in the Appendix.

Prior to February of 1972, Watkins entered into a long term lease to use William Nixon's tractor-trailer rig for various deliveries. In February of 1972 Watkins contracted to haul a shipment of Girl Scout cookies from Elizabeth, New Jersey, to Tucson, Arizona, and assigned the load to Nixon. Nixon and his co-driver, David Reynolds, left for Arizona on February 23, 1972, on a through bill of lading issued by Watkins.

Watkins' Certificate of Public Convenience issued by the I.C.C. permitted it to carry this type of goods only as far as Dallas, Texas. At this point Watkins leased the equipment to Zero in order to have the truck continue from Dallas to Tucson under Zero's permit, and in accordance with the interline agreement between the two companies. When the truck arrived in Dallas, Zero inspected the equipment and its authorized representative signed the appropriate papers

which leased the truck and drivers from Watkins to Zero. From the time the truck left Dallas until the time of the accident, it was authorized to do so under the Certificate of Public Convenience issued to Zero.

The percentage the truck traveled under the Zero certificate was approximately 37.5% of the trip, while the remaining 62.5% was traveled under the Watkins certificate. Gross revenue from the trip was $1,084.20, with Zero receiving a net income of $61.07 for this trip.

On February 28, 1972, a fatal traffic accident occurred while the tractor-trailer rig was being operated by Reynolds. As a result, a wrongful death action was filed against Watkins and Zero in Tucson. It was settled for $575,000 with the insurance carriers for Watkins contributing $275,000 and Zero's insurance carriers contributing $300,000 to the settlement.

An action was filed by Watkins against Zero in the U.S. District Court for the Northern District of Illinois and a suit was filed by Zero in the U.S. District Court in the Eastern District of Pennsylvania, each seeking indemnity from the other party, and these actions were consolidated into one action in Illinois. Watkins filed a motion for summary judgment claiming it was entitled to indemnification from Zero, which was denied by the District Court. *Watkins* v. *Zero* 381 F. Supp. 363 (N.D. Ill. 1974). Zero filed, and the District Court subsequently granted, a motion for summary judgment based on indemnification against Watkins in the amount of $300,000. The Court's judgment was appealed to the U.S. Court of Appeals for the Seventh Circuit and that Court affirmed the ruling of the District Court.

The basis for federal jurisdiction in the Court of the first instance is on complete diversity of citizenship between all plaintiffs and all defendants. Plaintiff Watkins is a Florida corporation, Plaintiff Insurance Company of North America is a Pennsylvania corporation, and Plaintiff Waco Fire and Casualty Company is a Georgia corporation, Defendant Zero is a Texas corporation, Defendant Continental Casualty Company is an Illinois corporation and Defendant Bankers and Shippers Company of New York is a New York corporation. The amount in controversy exceeds $10,000 exclusive of interest and costs.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT

### 1. The Decision Below Conflicts with the Proper Interpretation of 49 U.S.C. § 304 (e).

The Seventh Circuit's opinion in this decision stated that as a result the interlining agreement entered into between the parties control of the vehicle was retained by Watkins, and thus logically Watkins should be responsible for its use. Interline agreements are allowed under 49 C.F.R. § 1057.5. This is clearly contrary to the mandate set out by Congress in 49 U.S.C. § 304 (e)(2) which requires the holder of a Certificate of Public Convenience to have "full direction and control of such vehicle and will be fully responsible for the operation thereof . . ." The intent of Congress is specific in directing that the use of any leased equipment under I.C.C. directives shall require the lessee to be the party assuming responsibility.

This Court, in *Transamerican Freightlines, Inc.* vs. *Brada Miller Freight Systems, Inc.*, 96 S. Ct. 229

(1975) held concerning an indemnification agreement involving 49 C.F.R. § 1057.4:

> We hold only that the presence, in the equipment lease, of an indemnification clause directed to the lessor's negligence is not in conflict with the safety concerns of the Commission or with the regulation it has promulgated. *Id,* at p. 236.

There is no doubt that the respondents will rely on this case. It is Petitioner's position that it does not apply. This is because of this Court's rationale in the *Transamerican* holding:

> The indemnification agreement violates the Commission's rules only if accomplished by other indicia demonstrating that the lessor was in control of the service provided as well as of the physical operation of the vehicle. *Id*, p. 235.

In the case at hand there are other indications of Zero's lack of control in violation of the Commission's rules. Zero received a net income from the trip of $61.07 out of a total freight charge of $1,084.20. This violates one of the standards of control set out in *Diamond Transportation Systems, Inc., Ext—Wis. and Okla. Origin*, 117 M.C.C. 706. The Commission observed:

> While carriers may legitimately lease motor vehicle equipment from others to operate to the full extent of their authorities, it is illegal for them to enter into ostensible equipment leases under which the so-called equipment lessor, and not the lessee under whose operating authority the traffic purportedly moves, is actually the carrier performing the transportation service.

Since Zero and Watkins had entered into approximately 750 of these interlining agreements, it is clear

from the number alone that Zero was not controlling the equipment using its permit. Rather it was a fact of ". . . . the lessor merely use[ing] the operating rights of the purported equipment lessee and pay[ing] the lessee for such use." *Id* at 706.

In *Transamerican,* this Court discussed the rationale behind the I.C.C. regulations:

> It is apparent, therefore, that sound transportation services and the elimination of the problem of a transfer of operating authority, with its attendant difficulties of enforcing safety requirements and of fixing financial responsibility for damage and injuries to shippers and members of the public, were the significant aims and guideposts of the development of the comprehensive rules.
>
> It is likewise apparent that an important feature of the remedy the Commission devised to eliminate the understandable practices was the rule that any lease in which the lessor furnished the driver was to be one for 30 days or more . . . This served to eliminate the 'hard core of the problem,' that is 'the owner-operator trip lease and its attendant evils.' *Transamerican Freightlines,* Supra at p. 234.

Two other aspects should be pointed out in the Transamerican case. First, is the wording of the indemnification clause in which Transamerican, the lessee, was to be indemnified by Brada Miller, the lessor:

> 'Nothing in this Paragraph 9 contained shall be construed to in any way limit the liability of (Transamerican) to the public in connection with the use of said equipment under this Agreement.' Transamerican Freightlines, supra p. 235

Secondly, this Court stated that the indemnification clause between Brada Miller and Transamerican did not affect the basic responsibility of assumption of control or responsibility by the I.C.C. carrier to the public. *Transamerican Freightlines, supra,* p. 235.

However, a careful reading of the limitation agreement in the instant case shows that Watkins agreed to indemnify Zero for "*any liability* in connection with the use or operation of automotive equipment by (Watkins)". [Emphasis added] Clearly this indemnification agreement is contradictory to the basis of the holding in the *Transamerican* case. It is clear that if indemnifications such as this are allowed to be entered into between two I.C.C. regulated carriers, the safety of the other motorists on the nation's highways would be adversely affected. In effect, it allows the legally responsible carrier, to whom the particular permit was issued, to be relieved of *all liability* including that rising from its *own negligence,* for any equipment interlined to it and under its permit. This is clearly contrary to the intent of 49 U.S.C. § 304(e)(2) and the I.C.C. Regulations.

In addition, this Court pointed out that the trip lease between Brada Miller and Transamerican was for thirty (30) days which avoided the various problems in the trucking industry as set out in *American Trucking Assns.* vs. *United States,* 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953). The lease between Watkins and Zero in this case was for only two days, which indicates less control on behalf of Zero.

In upholding the regulations promulgated by the I.C.C., it was pointed out that the practice of authorized carriers using non-owned equipment by interchange

was to be avoided. *Id,* at 303. The Seventh Circuit, by its ruling in this case, is allowing Zero to lease out its permit without assuming any of the responsibility or liability for the equipment traveling under its permit. This clearly presents a danger to the motoring public by allowing Zero to give use of its permit many times without assuming *any* liability. This should not be allowed to occur.

Lastly, 49 C.F.R. § 1057.5(e) requires the lessor to state "the specific point of interchange, the date and time of the assumption of responsibility for the equipment . . . ." However, 49 C.F.R. §1057.5(f) requires the lessee to be considered as owner of the vehicle interlined. With Zero being allowed to lease its permit, and yet be completely free from liability through the hold harmless clause, it is clear that the best interests of the motoring public are not served by such an arrangement and that such agreements, obviously numerous in the trucking industry, should not be permitted.

**2. The Decision by the District Court Was Premature Since the Negligence of the Equipment Operator Had Not Been Determined.**

The decision of the Seventh Circuit completely ignores the fact that there had been no determination by the District Court that the driver, Reynolds, was an employee of Zero or Watkins, *and* whether he was negligent in the operation of his vehicle. In fact no determination was made at the lower Court level concerning the negligence of either Watkins or Zero. Under Rule 59, Federal Rules of Civil Procedure, it is clear that there can be no duty for a party to indemnify anyone for negligence until there has been an

affirmative determination of negligence on behalf of a party. Since the District Court did not determine whether Reynolds, Watkins and/or Zero were negligent in causing this accident, it is clear that there can be no duty imposed on Watkins to indemnify Zero, and that the granting of Summary Judgment by the District Court was improper.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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# APPENDIX

## APPENDIX

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 1517

WATKINS MOTOR LINES, INCORPORATED, a Florida corporation; THE INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; and WACO FIRE AND CASUALTY INSURANCE COMPANY, a Georgia corporation, *Plaintiffs*,

v.

ZERO REFRIGERATED LINES, a Texas corporation; and CONTINENTAL NATIONAL ASSURITY GROUP, an Illinois corporation, *Defendants*.

**Memorandum Opinion**

This is an action by one trucking company against another for indemnification under the regulations of the Interstate Commerce Commission for damages the plaintiff paid in settlement of a personal injury case. In the course of pleading, the defendant filed a counterclaim for indemnification pursuant to the terms of an interchange of equipment agreemetnt between the two companies. The other parties to the action are the companies' respective liability insurers. Federal jurisdiction is predicated upon the diversity of the parties' citizenship and an amount in controversy in excess of $10,000. The case is presently before this court to resolve the issues of law presented by plaintiffs' motion for summary judgment. For the reasons that follow, that motion is denied. Furthermore, summary judgment is entered in favor of the defendants as to the complaint.

## I.

The undisputed facts in this case are as follows:

Plaintiff Watkins Motor Lines, Incorporated ("Watkins") and defendant Zero Refrigerated Lines ("Zero") are common carriers in interstate commerce. Each company is authorized by the I.C.C. to operate over certain truck routes where the other company is not so authorized. For example, Zero is authorized to operate between Dallas, Texas and Tucson, Arizona, whereas Watkins is not.

Sometime in 1971 or early 1972, Watkins contracted to transport a truckload of Girl Scout Cookies from Elizabeth, New Jersey to Tucson, Arizona on a through bill of lading. Apparently because it did not have enough trucks in its fleet to perform the contract, Watkins entered into a "trip lease" agreement with Willie Nixon who owned and, with the assistance of David Reynolds, drove his own tractor-trailer rig. Basically, the agreement provided that the rig was leased to Watkins for the one trip, and that Nixon would drive it under the Watkins name. The route Nixon was to travel went from Elizabeth to Dallas and then on to Tucson. Because it was not permitted to operate between Dallas and Tucson, Watkins entered into an "interchange of equipment" agreement with Zero whereby Nixon was to transport the goods on the last leg of the trip under the Zero name. In substance and effect, then, Watkins leased the truck from Nixon and retained him and Reynolds as drivers under the trip lease agreement; and, for the Dallas to Tucson leg of the trip, Watkins leased from Zero the right to travel over Zero's route under the Zero name pursuant to the interchange of equipment agreement.

The gross revenue generated by the trip was $1,084.20. That sum was divided up so that Zero would receive $407.12 and Watkins would receive $677.08. However, Zero paid back $346.05 for "rental" of the truck, resulting in a net income to Zero of $61.07.

On February 25, 1972, the loaded truck arrived at the Zero truck yards where it was inspected by a Zero employee. The Watkins name on the truck was replaced by the Zero name, the "lease" papers were signed, and Nixon and Reynolds then embarked on the last leg of their trip. Several days later, before the goods were delivered, the truck was involved in an automobile accident in Tucson which resulted in the death of Patricia Uphaus.

In January of 1973, the Uphaus family sued Nixon, Reynolds, Watkins and Zero for the wrongful death of Patricia Uphaus. Watkins made a tender of the defense of the action to Zero, but it was refused. The parties subsequently settled the lawsuit for $575,000 with Watkins' insurers contributing $275,000 and Zero's insurer contributing $300,000. In settling, Watkins and Zero specifically reserved all the rights which they might have against each other. This litigation followed.

Watkins' complaint is comprised of two counts. Count I claims that the I.C.C. regulations governing interstate truck leasing practices obligated Zero to take over the defense in the *Uphaus* action and to indemnify Watkins and its insurer for any damages that the latter were required to pay out. Count II basically sets forth the same claim against Zero's insurer.

Zero's counterclaim seeks to recover $300,000 from Watkins on the ground, *inter alia,* that the equipment interchange agreement with Watkins required the latter to hold Zero harmless from any liability connected with the use of the truck on Zero's route between Dallas and Tucson. That agreement reads, in pertinent part:

"Lessor agrees, during the term of this lease—

* * * * *

F. To indemnify lessee against any loss or damage resulting from the negligence, incompetence or honesty (sic) of said driver(s)."

Another general agreement previously entered into by the parties reads as follows:

> "The Insured, a Corporation: Watkins Motor Lines, Inc. hereby agrees to hold Zero Refrigerated Lines and its Insurance Underwriters harmless of any liability in connection with the use and operation of automotive equipment by the Insurer: Watkins Motor Lines, Inc. over routes in connection with an (sic) pursuant to operating rights heretofore issued by various motor carrier regulatory bodies and to indemnify Zero Refrigerated Lines and its insurance underwriters from any loss or damage which may sustain by reason of such use and operation of said equipment by The Insured: Watkins Motor Lines, Inc."

Although it does not so state, Watkins' claim for indemnification appears to be founded on 49 C.F.R. § 1057.4, which reads in pertinent part as follows:

> "§ 1057.4 *Augmenting Equipment. Other than equipment exchanged between motor common carriers in interchange service as defined in §1057.5,* authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:
>
> (a) Contract requirements. The contract, lease, or other arrangement for the use of such equipment:
>
> * * *
>
> (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the *complete assumption of responsibility in respect* thereto, by the lessee for the duration of said contract, lease or other arrangement. . . ." (emphasis added).

In support of its pending motion, Watkins relies primarily on the case of *Alford* v. *Major*, 470 F.2d 132 (7th Cir. 1972). There, the court held unenforceable an indemnification

clause in a trip lease agreement which obligated the lessor of a truck to indemnify the lessee for any liability imposed on the latter as a result of negligence of the lessor or the lessor's driver. The ground for the court's ruling was that such an agreement, under the circumstances, would contravene the public policy embodied in 49 C.F.R. § 1057.4, *supra;* for there had been a *prima facie* showing that the parties violated the regulation by failing to give the lessee full control of the operation of the truck in question.

Defendants contend, and in my opinion correctly so, that neither § 1057.4 nor the *Alford* decision are applicable here because they govern a *trip lease* agreement—not an *interchange of equipment* agreement such as the one involved in the present case. Rather, the governing regulation is 49 C.F.R. § 1057.5, which reads in relevant part as follows:

> "§ 1057.5 *Interchange of equipment.* Authorized common carriers may by contract, lease, or other arrangement, interchange any equipment defined in § 1057.2 (i.e., any motor vehicle for transportation of property for hire by authorized carriers) with one or more other such common carriers, or one of such carriers may receive from another such carrier, any of such equipment, in connection with any through movement of traffic under the following conditions:
>
> • • •
>
> (f) *Connecting carriers considered as owner.*
>
> An authorized carrier receiving equipment in connection with a through movement shall be considered the owner of the equipment for the purpose of leasing the equipment to other authorized carriers in furtherance of the movement to destination or the return of the equipment after the movement is completed."

Nowhere in this section is it provided, as it is in § 1057.4 (a)(4), that the lessee shall take complete responsibility titled to be indemnified by Zero for its share of the settle-

for, and control of, the operation of the truck in question. Therefore, it is impossible to conclude that Watkins is enhibit the shifting of risks in the trucking business by means ment in the *Uphaus* litigation.

On the contrary, as I indicated in *General Expressways, Inc.* v. *Schreiber Freight Lines, Inc.*, 377 F.Supp. 1159 (N.D. Ill. 1974), the distribution of risks undertaken by the type of contract involved here does not impair the policy established by Congress in favor of preserving highway safety;[1] for its effect on the exercise of due care by drivers and their employers in the operation of trucking equipment is no different than the effect of insurance. Because neither the statute nor the regulations promulgated thereunder proof insurance, there is no real basis to prohibit the type of

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[1] The statute authorizing the I.C.C. to promulgate trucking regulations, 49 U.S.C. § 304(e) reads as follows:

> (e) [T]he Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—
>
> (1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and
>
> (2) Such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment."

risk-shifting involved in an indemnity clause in either a trip lease or an interchange of equipment agreement. As stated by the Court in *Allstate Insurance Co.* v. *Alterman Transportation Lines, Inc.*, 465 F.2d 710, 713 (5th Cir. 1972),

> "We are of the opinion that had the I.C.C. intended to prevent indemnification between trucking companies, it would have said so in precise terms."

*Accord, Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.*, 492 F.2d 243, 246 (4th Cir. 1974).

Lastly, as was stated in *General Expressways, Inc.* v. *Schreiber Freight Lines, Inc., supra*:

> "Any lingering doubt created by (the lessor's) public policy argument is dispelled by the public policy of fostering freedom of contract. In *Baltimore & Ohio Southwestern Railway Company* v. *Voight*, 176 U.S. 498, 505 (1900), the Court said, it must not be forgotten that,
>
> > 'the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare.'" 377 F. Supp. at 1161.

It is concluded not only that plaintiffs are not entitled to summary judgment, but that judgment should be entered in favor of the defendants as to the claims presented in the complaint.

The fact that defendants did not choose to file a cross-motion for summary judgment does not preclude the court from entering judgment in their favor.

> "If either the proponent of the claim or the defending party moves for a summary judgment, and the court

finds that the moving party is not entitled thereto, but that the other party is so entitled, it would seem that the court has the power to enter the proper judgment, although a cross-motion therefore was not made. Rule 54(c) gives the court the power to enter the final judgment to which the prevailing party is entitled, even if the party has not demanded such relief in his pleadings, except in default judgment cases. The theory is that the form of the pleadings should not place a limitation upon the power of the court to do justice. So where one party has invoked the power of the court to render a summary judgment against his adversary, it is reasonable that this invocation gives the court power to render a summary judgment for his adversary if it is clear that the case warrants that result." 6 *Moore's Federal Practice* Par. 56.12 at 2241.

The facts in this case are undisputed; and plaintiffs' theory that they are entitled to indemnification under *Alford* v. *Major, supra* and § 1057.4 of the I.C.C. regulations is simply contrary to the law as I read it. Since it is today held that plaintiffs are not entitled to judgment as a matter of law under the undisputed facts of the case, the only logical conclusion is that summary judgment must be entered in favor of the defendants as to the complaint. The counterclaim is left pending.

*It is so ordered.*

/s/ R. B. Austin
Judge, United States District Court

Dated: September 11, 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 75-1183, 75-1184

WATKINS MOTOR LINES, INC., a freight corporation, THE INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation, and WACO FIRE AND CASUALTY COMPANY, a Pennsylvania corporation,
*Plaintiffs-Appellants-Cross-Appellees,*

v.

ZERO REFRIGERATED LINES, a Texas corporation,
*Defendant-Appellee*

and

CONTINENTAL NATIONAL ASSURETY CORPORATION, an Illinois corporation; and CONTINENTAL CASUALTY COMPANY and BANKERS AND SHIPPERS COMPANY OF NEW YORK.
*Defendants-Appellees-Cross-Appellants*

Appeal from the United States District Court for the Northern District of Illinois, Northern Division—Nos. 73 C 1517, 74 C 2212

RICHARD B. AUSTIN, *Judge*

ARGUED JUNE 9, 1975—DECIDED AUGUST 11, 1975

Before CLARK, *Associate Justice**, BAUER, *Circuit Judge*, and GRANT, *District Judge.***

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** Senior Judge Robert A. Grant, United States District Court for the Northern Division of Indiana, is sitting by designation.

(75-1183, 75-1184)

PER CURIAM:

This is a diversity action brought by appellant Watkins Motor Lines (Watkins) and it insurance carrier against appellee Zero Refrigerated Lines (Zero) and its insurance carriers, seeking indemnification for damages. On cross-motions for summary judgment, the United States District Court for the Northern District of Illinois found for Zero. We affirm.

In January, 1968, Watkins and Zero entered into an interline agreement for the interchange of equipment which provided for the interchange of traffic with one company's equipment along the other company's routes. Up to April, 1974, there had been approximately 750 exchanges of equipment between Watkins and Zero, including those pursuant to a supplementary agreement in February of 1972. An indemnification contract was signed concurrently with the original interline agreement and was rewritten on June 2, 1971. This indemnification agreement was required by Zero before it would agree to interchange traffic and equipment with Watkins and provided that Watkins would hold Zero and its insurance underwriters "harmless of any liability in connection with the use and operation of automotive equipment" by Watkins over routes on which various motor carrier regulatory bodies had authorized Zero to operate.

In February of 1972, Watkins contracted to haul a shipment of Girl Scout cookies from Elizabeth, New Jersey, to Tucson, Arizona, and assigned one William Nixon to make the delivery. Previously, Watkins, which did not have sufficient equipment to handle all of its shipments, had entered into a long term lease with Nixon to make available his tractor trailer rig on a "trip lease" basis. The cookies were loaded onto Nixon's rig which bore the Watkins interchangeable name plate. Nixon and his co-driver, David Reynolds, left for Arizona on February 23, 1972 on a through bill of lading. Since Watkins' Certificate of Public Con-

venience permitted carriage of goods only as far as Dallas, Texas, the company arranged with Zero to have the truck continue from Dallas to Tucson under Zero's name, pursuant to the standing interline agreement. This was accomplished through the fiction of an equipment lease by which Zero "rented" the truck from Watkins for two days, receiving the fee for carrying the cookies from Dallas to Tucson but paying for the "rental" to Watkins. Upon its arrival in Dallas, Zero inspected the equipment, changed the Watkins nameplate to Zero's own, and signed the appropriate papers covering the "rental" of the equipment and drivers through to Tucson.

On February 28, 1972, a fatal traffic accident occurred in Tucson while the tractor trailer rig was being operated by Reynolds. As a result, a wrongful death action was filed against Watkins and Zero in Phoenix. It was later settled for $575,000 with the burden split by the respective insurance carriers as follows: $300,000 by Zero's and $275,000 by Watkins'. Subsequently Zero filed a suit in the U.S. District Court in the Eastern District of Pennsylvania seeking indemnity for the $300,000 which it paid. That action was transferred to Chicago and consolidated with a similar suit filed by Watkins against Zero which was then pending.

Watkins then filed a motion for summary judgment claiming that it was entitled to indemnity from Zero under the rule announced by this Circuit in *Alford* v. *Major*, 470 F.2d 132 (7th Cir. 1972). The district court found *Alford* inapposite because the earlier case involved trip lease agreements undr 49 C.F.R. § 1057.4, while the present case dealt with an interchange of equipment under 49 C.F.R. § 1057.5. The district court therefore entered a judgment against Watkins on its motion for summary judgment and for Zero on its counterclaim. A summary judgment against Watkins was entered for $300,000 in favor of Zero's insurers, Bankers and Shippers Company of New York ($100,000) and Continental Casualty Company ($200,000).

After this appeal was filed but before it was argued, the Supreme Court granted a writ of certiorari in *Transamerica Freight Lines* v. *Brada Miller Freight Systems,* No. 74-54. In that case, this circuit cited *Alford* v. *Major* in issuing an unpublished order striking down an indemnity clause in a lease of a tractor-trailer whereby the lessor agreed to hold the lessee harmless for any negligence of the lessors or its agents and to indemnify the lessee from any claims arising out of any injury sustained through any negligence of lessor or its agents or employees. It is not insignificant that three other circuit courts have handed down decisions conflicting with *Alford. See Jones Truck Lines, Inc.* v. *Ryder Truck Lines, Inc.,* 507 F.2d 100 (6th Cir. 1974); *Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.,* 492 F.2d 243 (4th Cir. 1974); *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.,* 465 F.2d 710 (5th Cir. 1972).

Although it might be the better part of valor to hold this case pending the Supreme Court's examination of the *Alford* rationale in *Transamerica,* we have concluded that *Alford* is inapposite here, regardless of what the Court may do. *Alford,* as did *Transamerica, Jones Truck Lines, Carolina Freight Carriers,* and *Allstate Insurance,* dealt with a trip lease under 49 C.F.R. § 1057.4, not an equipment exchange under § 1057.5. This is significant because it is only within the former regulation that the requirement of "complete assumption of responsibility * * * by the lessee for the duration of said contract, lease or other arrangement." 49 C.F.R. § 1057.4(a)(4).

When Watkins dealt with Zero, it was acting under § 1057.5, which has no provision comparable to § 1057.4(a)(4). The requirements for an equipment exchange under § 1057.5 appear to have been met, and we perceive no bar to the indemnification agreed upon by the parties. It is true that it was Zero's certificate under which the shipment was moving at the time of the accident, but, as we view it, Watkins retained control of the equipment and, quite logically,

retained responsibility for its use. If there is a public policy argument in this case, it lies with Zero, for to release Watkins from liability might encourage recklessness in driving on the part of the actual operators of trucking equipment. Since highway safety is one of the paramount goals of the regulations involved, it follows that the indemnity agreement serves a useful purpose and must be upheld.

AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

## INDEMNIFICATION AGREEMENT

I. Agreement between The Insured: Watkins Motor Lines. Inc. and Zero Refrigerated Lines, Box 7249 Station "A" San Antonio, Texas 78207.

The Insured, a Corporation: Watkins Motor Lines, Inc. hereby agrees to hold Zero Refrigerated Lines and its Insurance Underwriters harmless of any liability in connection with the use and operation of automotive equipment by The Insured: Watkins Motor Lines, Inc. over routes in connection with and pursuant to operating rights heretofore issued by various motor carrier regulatory bodies to Zero Refrigerated Lines and to indemnify Zero Refrigerated Lines and its insurance underwriters from any loss or damage which may sustain by reason of such use and operation of said equipment by The Insured: Watkins Motor Lines, Inc.

Dated at Lakeland, Florida this 2nd day of June, 1971.

Witness: ..... The Insured: Watkins Motor Lines, Inc.

..... .....
Name Title

### Limits of Liability

To pay the difference between total limits of:

| | |
|---|---|
| $9,900,000.00 | Ultimate net loss any one occurrence Automobile bodily injury, property damage and motor truck cargo combined single limit and underlying self-insured limits of: |
| $ 100,000.00 | Automobile Bodily Injury and Property Damage and Motor Truck Cargo; ultimate net loss any one occurrence; combined single limit. |

B. Said Certificate of Insurance which provides coverage for the insured: Watkins Motor Lines, Inc. includes contractual liability for the type contained in the agreement between the insured: Watkins Motor Lines, Inc. on the one hand and Zero Refrigerated Lines on the other.

C. It is further agreed that there will be no cancellation, reduction or termination of the coverage to which this agreement is applicable without first giving Watkins Motor Lines, Inc. (30) days' advance notice of such by registered mail.

Dated at Lakeland, Fla. this 2nd day of June, 1971.

Witness: INSURANCE CO. OF NORTH AMERICA

WAYNE VAUGHN By: (Illegible)
*Authorized Agent*

II. Acknowledgement of insurance coverage overlying self-insured limits.

A. Insurance Company of North America has issued its policy No. SMT 10411, effective 12:01 A.M., May 31, 1971, which includes coverage as described above.

III. Acknowledgement of Statutory Filings covering Self-Insured Limits:

A. Protective Insurance Company, 3100 North Meridian Street, Indianapolis, Indiana, hereby acknowledges that to meet Interstate Commerce Commission statutory regulations it has filed with the Interstate Commerce Commission on behalf of the Insured, Lakeland, Florida: Watkins Motor Lines, Inc. Surety Bond No. B1183 for auto bodily injury and property damage liability and motor truck cargo liability.

B. In addition, Protective Insurance Company has filed surety bonds on behalf of the Insured: Watkins Motor Lines, Inc. in such amounts in accordance with their individual requirements.

C. It is further agreed that Protective Insurance Company shall not cancel or terminate the said surety bond filings to which this agreement is applicable without first giving Zero Refrigerated Lines thirty (30) days advance notice of such action by registered mail.

Dated at Lakeland, Fla. this 2nd day of June, 1971.

Witness:
WAYNE VAUGHN

PROTECTIVE INSURANCE COMPANY
By: (Illegible)
*Attorney-in-Fact*

No. 75-1274

APR 7 1976
MICHAEL RODAK, JR., CLERK

In the

# Supreme Court of the United States

OCTOBER TERM, 1975

WATKINS MOTOR LINES, INCORPORATED, a Florida corporation; THE INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; and WACO FIRE AND CASUALTY INSURANCE COMPANY, a Georgia corporation,

*Petitioner,*

*vs.*

ZERO REFRIGERATED LINES, a Texas corporation and CONTINENTAL NATIONAL ASSURITY GROUP, an Illinois corporation,

*Respondent,*

and

CONTINENTAL CASUALTY COMPANY and BANKERS AND SHIPPERS COMPANY OF NEW YORK,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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## *No. 75-1274*

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WATKINS MOTOR LINES, INCORPORATED, a Florida corporation; THE INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; and WACO FIRE AND CASUALTY INSURANCE COMPANY, a Georgia corporation,

*Petitioner,*

*vs.*

ZERO REFRIGERATED LINES, a Texas corporation and CONTINENTAL NATIONAL ASSURITY GROUP, an Illinois corporation,

*Respondent,*

and

CONTINENTAL CASUALTY COMPANY and BANKERS AND SHIPPERS COMPANY OF NEW YORK,

*Respondent.*

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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The Respondents Zero Refrigerated Lines, Continental Casualty Company, and Bankers and Shippers Company of New York respectfully pray that this Court decline to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on August 11, 1975.

## ARGUMENT

The Petitioners seek a hearing in this Court on the validity of indemnity agreements between common carriers which interchange equipment and drivers pursuant to ICC Regulations, 49 C.F.R. §1057.5, after this Court has recently held that such agreements are valid and enforceable, *Transamerican Freight Lines, Inc.* v. *Brada Miller Freight Systems,* 96 S. Ct. 229 (1975), thereby resolving the only issue of significance urged in the pending petition. Petitioners make this request even though this case does not involve any of the ICC regulations previously relied upon by a minority line of cases to nullify indemnity agreements in other types of equipment leases, 49 C.F.R. §§1057.3(a) and 1057.4(a)(4). All of Petitioners' arguments have been dealt with and answered by both the trial court, 381 F. Supp. 363 (N.D. Ill., 1974), and by the Seventh Circuit Court of Appeals (see in particular pp. 12a-13a of the Petition), 525 F.2d 538 (7th Cir., 1975).

The decision of the Seventh Circuit in this matter foreshadows the reasoning of this Court in *Transamerican,* where the Court cited with approval both the District Court and Court of Appeals decisions in the present case, 96 S. Ct. 229, 233 (note 6). The holding of the Seventh Circuit is also consistent with the decisions of the other Circuit Courts of Appeal, holding that there is nothing in the ICC equipment lease regulations or in public policy which invalidates an indemnity agreement in an interchange agreement between common carriers.

Petitioners now contend that the interchange agreement which Watkins entered into with Zero in order to deliver a load of Girl Scout cookies to Tucson, Arizona "should not be permitted" (Petition, p. 11). Watkins appears to be arguing that this Court should not permit Watkins to contract (and obtain insurance for such contract) to enable it to carry goods which it had contracted to deliver to the point of destination pursuant to ICC regulations. Obviously, it is not Watkins which is now repudiating its own contractual agreement (under which at least 750 exchanges of equipment have been made), but it is in fact Watkins' insurers who seek to avoid a loss which they expressly agreed to insure (Petition, p. 15a).

## CONCLUSION

It is therefore respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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